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NO. 56206-1-I
Consol. With NO. 43255-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DALE SCHWAB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth L. Cowsert

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In 1998, Appellant Dale Schwab was convicted of first degree manslaughter and second degree felony murder for a single homicide and appealed. In a published decision, *State v. Schwab,* 98 Wn.App. 179, 988 P.2d 1045 (1999), this Court held his two convictions violated the state and federal constitutional guarantees against double jeopardy, affirmed the conviction and sentence for second degree felony murder, and vacated his conviction and sentence for first degree manslaughter. In 2002, the Washington Supreme Court held assault could not serve as the predicate crime for second degree felony murder.[1] In 2005, this Court granted Mr. Schwab's personal restraint petition, in which the State conceded the *Andress* decision applied to Mr. Schwab. On remand, the trial court reinstated the already vacated 1999 first degree manslaughter conviction. Mr. Schwab appeals, arguing the trial court lacked authority to reinstate the vacated first degree manslaughter conviction and urges this Court to reject the State's invitation to recall the mandate from his 1999 cause number.[2]

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[1] *In re Personal Restraint of Andress,* 147 Wn.2d 602, 604, 56 P.3d 981 (2002).

[2] A copy of the State's Motion to Recall Mandate for CoA No. 43255-9-I is attached as Appendix A.

B. ASSIGNMENT OF ERROR.

The trial court erred in reinstating a conviction the Court of Appeals vacated.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Under the "law of the case" doctrine, a trial court is bound by a decision of the Court of Appeals and lacks authority to ignore or otherwise modify a reviewing court's order. In the instant case, this Court vacated Mr. Schwab's first degree manslaughter conviction in a published 1999 decision. Did the trial court have any authority in 2005 to reinstate the first degree manslaguther conviction vacated by this Court in 1999?

2. The "law of the case" doctrine precludes a trial court on remand or another appellate court in a subsequent appeal from reexamination of issues of law decided on appeal, as a restriction self-imposed on the courts to further the interests of judicial efficiency. This doctrine is based on the policy that issues once decided should remain so. In the instant case, Mr. Schwab's manslaughter conviction was vacated by this Court in 1999. Does the "law of the case" doctrine preclude this Court from reexamining this previously decided issue?

3. Rule of Appellate Procedure ("RAP") 12.7(a) states the Court of Appeals "loses the power to change or modify its decision (1) upon issuance of a mandate . . . except when the mandate is recalled as provided in rule 12.9," which only allows the Court to recall a mandate 1) to ensure trial court compliance with a decision, or 2) to correct a mistake or modify a decision obtained by fraud of a party. In the instant case, the State cannot satisfy the criteria for RAP 12.9. Should this Court recall a mandate without authority under the Rules of Appellate Procedure?

D. STATEMENT OF THE CASE.

1. Procedural Background. On December 22, 1997, Dale Schwab and Aaron Beymer assaulted Ernest Sena, took the money from his pockets, and placed him on nearby railroad tracks covered with debris. *State v. Schwab,* 98 Wn.App. 179, 182, 988 P.2d 1045 (1999). A train running on those same tracks later severed Sena's body. *Id.* Schwab was charged with first degree premeditated murder and second degree felony murder based on second degree assault and/or first degree theft. 98 Wn.App. at 180. The jury convicted Mr. Schwab of second degree felony murder and first degree manslaughter as a lesser included offense of first degree murder. *Id.*

Mr. Schwab appealed his two murder convictions for the one homicide, arguing the two convictions violated his constitutional guarantee against double jeopardy. *Id.* In 1999, this Court agreed with Mr. Schwab that double jeopardy barred convictions for both second degree felony murder *and* first degree manslaughter for a single homicide, concluding one killing equals one homicide; one unlawful homicide equals *either* murder, homicide by abuse, *or* manslaughter *and* the legislature did not intend to provide multiple punishments for a single homicide. 98 Wn.App. at 180, 188-89. This Court held "convictions for both second degree felony murder and first degree manslaughter for a single homicide violate state and federal constitutional guarantees against double jeopardy." 98 Wn.App. at 190. This Court affirmed Schwab's conviction and sentence for second degree felony murder and vacated his conviction and sentence for first degree manslaughter. *Id.*

On April 13, 2000, Judge Cowsert in Snohomish Superior Court entered an Order Amending Judgment & Sentence to comply with this Court's published decision, thereby vacating Mr. Schwab's conviction and sentence for first degree manslaughter. CP 54-55.

The Washington Supreme Court subsequently ruled second degree manslaughter predicated on assault under RCW 9A.32.050 was not a crime. *In re Personal Restraint of Andress,* 147 Wn.2d 602, 604, 56 P.3d 981 (2002). Thereafter, the Supreme Court ruled *Andress* applied to any person convicted of second degree felony murder under former RCW 9A.32.050, if assault was the predicate felony, whether their conviction was final or not. *In re Personal Restraint of Hinton,* 152 Wn.2d 853, 100 P.3d 801 (2004).

Following *Andress* and *Hinton,* Mr. Schwab filed a Motion to Modify and Correct Judgment and Sentence in Snohomish Superior Court, arguing his second degree felony murder conviction must be vacated pursuant to *Andress.* CP 45-53. The Superior Court transferred Mr.Schwab's motion to this Court for consideration as a personal restraint petition.

On January 6, 2005, this Court granted Mr. Schwab's personal restraint petition, accepting the State's concession that *Andress* applied to Mr. Schwab's felony murder conviction, ruling

> Under *Andress* and *Hinton,* Schwab was convicted of a nonexistent crime. Since we are bound by the decisions of the Washington Supreme Court, *State v. Hairston,* 133 Wn.2d 534, 539, 946 P.2d 397 (1997); *State v. Gore,* 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R.4th 975 (1984), Schwab's second degree felony murder conviction must be vacated.

> The personal restraint petition is granted. We remand this matter to the Snohomish County Superior Court for further lawful proceedings consistent with *Andress* and *Hinton.*

CP 23-24. A Certificate of Finality was entered on March 1, 2005. CP 21.

2. Remand Proceedings. On remand, the deputy prosecutor noted that originally Mr. Schwab was convicted by a jury of both manslaughter in the first degree and felony murder in the second degree predicated on assault, and argued that despite the fact this Court vacated each conviction in two separate appeals, the superior court should reinstate the manslaughter conviction. 2/17/05RP at 3.[3] The deputy prosecutor requested Judge Cowsert impose a sentence under authority implied in the Court of Appeals Order Granting Personal Restraint Petition, which remanded Schwab's case for "further lawful proceedings consistent with both *Andress* and *Hinton,"* running in conjunction with *State v. Ward,* which the State mentioned in its brief. *Id.* Mr. Schwab countered

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[3] The Verbatim Report of Proceedings will be referred to by their date, followed by "RP" and the page number. The transcript for the February 17, 2005 Report of Proceedings was filed in Snohomish Superior Court. CP __, sub. no. 117. A supplemental designation of clerk papers is being simultaneously filed with the filing of the Opening Brief, and a copy is attached for the Court's convenience as Appendix B.

that this Court vacated both convictions and the superior court lacked any authority to hold him on any charge and could not "unvacate" a previously vacated conviction. 2/17/05RP at 4-5. Specifically, when this Court originally vacated the first degree manslaughter conviction, Schwab argued, it did not rule, "unless the Supreme Court changes the law on Murder Two based on Assault Two, in which case we will unvacate it." 2/17/05RP at 7.

Judge Cowsert requested some authority from the prosecutor that said it could "unvacate" the Court of Appeals vacation of the first degree manslaughter conviction:

> Counsel, just tell me what [vacate] means, then. I always thought if the Court [of Appeals] said a conviction is vacated, maybe their reason was totally, entirely wrong, but how do we get around it being vacated? Give me some authority.

2/17/05RP at 7.

At the next hearing, the deputy prosecutor merely reiterated his earlier position, arguing the order granting Mr. Schwab's personal restraint petition gave the superior court authority to reinstate (or "unvacate") the first degree manslaughter, when the matter was remanded "for further lawful proceedings consistent with *Andress* and *Hinton*." 2/24/05RP at 3-4, citing PRP Order, at 2. *See* CP 24.

The trial court correctly disagreed, clarifying this Court's PRP order remanded with further "lawful proceedings consistent with *Andress* and *Hinton*, . . . which has nothing to do with reinstatement of a vacated judgment for manslaughter." 2/24/05RP at 6. The trial court explained,

> That's the trouble I'm having. That's a jump for me to make, to say that somehow, by remanding the case for proceedings pursuant to *Andress* – which to me would probably mean the entry of an order of dismissal because that crime doesn't exist – that that gives me the authority to set aside their order vacating the conviction. Although I understand you are saying the reason for that vacation is no longer there, my question is, who is really the one to do that? Do I have the authority to do that, or do they? And if they do, which I think we all think they do, why didn't they, when Mr. Fine sent the letter saying, What about the manslaughter?

Id.

The trial court agreed that the language in the PRP Order remanding for further lawful proceedings did not grant the court authority to reinstate a previously vacated manslaughter conviction and to do so would be "overruling [the Court of Appeals]" or at least modifying a Court of Appeals decision. 2/24/05RP at 10-11. The trial court also conceded it could not find any authority to overrule this Court's order. *Id.* at 11. In fact, the trial court even agreed with defense counsel that *State v. Strauss,* 119 Wn.2d 401, 832 P.2d

78 (1992), came close to specifically holding the court had no such authority. *Id.* Accordingly, the trial court gave the State yet another chance to find any authority, and directed the State to apply to the Court of Appeals for guidance. 2/24/05RP at 12.

The deputy prosecutor also asserted such a solution would also be in accordance with *State v. Ward*, 125 Wn. App. 137, 104 P.3d 61 (2005). 2/24/05RP at 4. Judge Cowsert disagreed at first, concluding *Ward* was not helpful, since in that case the Court of Appeals had not vacated the defendant's first degree manslaughter conviction, while in Mr. Schwab's case the first degree manslaughter was vacated by the Court of Appeals. 2/24/05RP at 4-5, 7. Judge Cowsert distinguished *Ward*, because in that case the manslaughter charge was "still alive" while the manslaughter conviction in Mr. Schwab's case was extinct and could not be revived. 2/24/05RP at 7.

On April 14, 2005, Snohomish County Prosecutor Seth Fine accompanied the deputy prosecutor to explain to the trial court that he believed the trial court had authority to overrule this Court's vacation of Mr. Schwab's first degree manslaughter conviction and reinstate it. 4/14/05RP at 3. Mr. Fine informed the trial court that

he tried to recall the Certificate of Finality for the PRP to clarify the remedy in the instant case. 4/14/05RP at 3-4.[4]

Mr. Schwab informed the trial court it had three options: 1) release him because his convictions were vacated; 2) overrule this Court's decision despite the fact that the superior court lacked such authority, or 3) continue the case and allow the State to seek redress in the reviewing courts. 4/14/05RP at 6. Should the Court of Appeals deny the motion to recall the certificate of finality, Mr. Schwab argued, the trial court would have only one option, which would be to release him. 4/14/05RP at 7.

Despite never once hearing any authority to do so, the court ruled in favor of the State. The court again recognized that the *Ward* decision was not on point, since a reviewing court had not vacated the manslaughter conviction as it did in the instant case. 4/14/05RP at 13. Nevertheless, the trial court ruled,

> It seems to me I have an obligation, if I can, to exercise my authority to take any action that I'm allowed to in the interest of justice. In my view, justice is people being held accountable for what they have committed. In this case, Mr. Schwab could not have committed a murder in the second degree, felony murder. Mr. Schwab did commit, apparently, based on the jury's finding, a manslaughter. Manslaughter was taken away because, at the time that

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[4] This Court subsequently denied Mr. Fine's motion to recall the mandate on April 21, 2005.

> decision was made, his felony murder conviction was legitimate.
>
> It has now been determined his felony murder conviction is not legitimate and has been vacated, leaving me in the position of believing the right thing to do, what I have been, in my view, directed by the Court of Appeals to do, and the honest and just thing to do, is to reinstate the manslaughter conviction and impose sentence thereon.

4/14/05RP at 13-14.

Mr. Schwab timely appealed. CP 19-20.

On April 21, 2005, the deputy prosecutor filed a Motion to Recall Mandate for CoA No. 43255-9-I, the mandate following Mr. Schwab's successful direct appeal of his 1998 convictions in violation of double jeopardy that resulted in a published decision.

On June 27, 2005, this Court entered an Order of Consolidation, consolidating the State's motion to recall mandate under cause number 43255-9-I and the instant appeal, 56206-1-I.

E. ARGUMENT.

1. THE TRIAL COURT LACKED AUTHORITY TO REINSTATE A CONVICTION VACATED BY THIS COURT.

a. Double jeopardy promotes finality in legal proceedings and prevents relitigation of vacated sentences. The bar against double jeopardy derives from an intent to promote fairness and finality in legal proceedings. *United States v. Wilson,*

420 U.S. 332, 343, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1974). When a conviction is "vacated," it is wiped away forever, it does not mean that it lurks in the ether to be "reinstated" at a later date in superior court. *See, Chaves v. Reno,* 1999 U.S. Dist. Lexis 21151 (D. Mass. 1999) (holding vacated convictions are convictions that no longer exist and State could not cite any authority to show such vacated convictions could be a basis for deportation.); *People v. Wilson,* 43 Mich. App. 459, 463, 204 N.W.2d 269 (Mich. Ct. App. 1972) (prosecutor committed reversible error when he tried to impeach witness with vacated conviction).

In the instant case, Mr. Schwab argued in his first appeal that double jeopardy barred convictions of both second degree felony murder *and* first degree manslaughter for a single homicide, and this Court concluded one killing equals one homicide; one unlawful homicide equals *either* murder, homicide by abuse, *or* manslaughter *and* the legislature did not intend to provide multiple punishments for a single homicide. 98 Wn.App. at 180, 188-89. In 1999, this Court held "convictions for both second degree felony murder and first degree manslaughter for a single homicide violate state and federal constitutional guarantees against double jeopardy." 98 Wn.App. at 190. This Court affirmed Schwab's

conviction and sentence for second degree felony murder and vacated his conviction and sentence for first degree manslaughter. *Id.*

Once this Court vacated the first degree manslaughter conviction in 1999, that conviction was wiped away, gone forever, and does not linger in the shadows to be reinstated at a later date. It is gone. Six years have passed and neither the State nor the trial court can reinstate this vacated, nonexistent, conviction.

b. The law of the case doctrine prevents a superior court from ignoring an appellate court determination. The Washington Supreme Court has ruled the law of the case doctrine prohibits a superior court from litigating an issue decided by a reviewing court:

> The "law of the case" doctrine generally "refers to 'the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand'" or to "the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case." *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, WASHINGTON PRACTICE, Judgments § 380, at 55 (4th ed. 1986) (footnote omitted)).
>
> The doctrine serves to "promote[] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811

> (1988) (quoting 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice P 0.404[1], at 118 (1984)). The courts apply the doctrine in order "to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." 5 Am. Jur. 2d Appellate Review § 605 (2d ed. 1995) (footnote omitted).

(Emphasis added.) *State v. Harrison,* 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

Thus, a trial court may not "overrule," "reinstate," or otherwise relitigate an issue the Court of Appeals has since ruled on in a case, as the Washington Supreme Court in *State v. Strauss* ruled:

> The Court of Appeals explicitly held that the trial court erred in finding the aggravating factors at issue. At the remand hearing, the trial court heard evidence regarding the defendant's future dangerousness, and no new evidence came to light regarding the other aggravating factors which the Court of Appeals had invalidated. The State has failed to present any authority for the proposition that under these circumstances, a trial court may ignore an appellate court's determination on remand and reenter the same findings which the appellate court had earlier invalidated. The trial court on remand was bound by the law of the case. The court lacked the authority to enter the same findings that the Court of Appeals had earlier invalidated. An individual trial court is not free to determine which appellate court orders, if any, it chooses to follow. If a trial court were free to ignore such orders, total chaos would result in the court system.

(Emphasis added.) 119 Wn.2d 401, 413, 832 P.2d 78 (1992). Here, the trial court fully heard and understood trial counsel's argument that this Court had vacated Mr. Schwab's manslaughter in the first degree conviction in a published decision.

The "law of the case" doctrine ensures judicial efficiency by prohibiting reexamination by lower courts of the reviewing court's opinion:

> The "law of the case" doctrine, as it applies to this case, operates to preclude a reexamination of issues of law decided on appeal, explicitly or by necessary implication, either by the district court on remand or by the appellate court in a subsequent appeal. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061-62 (5th Cir. 1981); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975). It is a restriction self-imposed on the courts to further the interests of judicial efficiency, and is based on the policy that issues once decided should remain so. An appellate court could not perform its duties satisfactorily and efficiently if every question it once considered and decided remained open for reexamination in subsequent proceedings in that same case. *Key v. Wise,* 629 F.2d 1049 (5th Cir. 1980) quoting *White v. Murtha,* 377 F.2d 428, 431 (5th Cir. 1967).

(Emphasis added.) *Chapman v. National Aeronautics & Space Admin.,* 736 F.2d 238, 241 (5th Cir. 1984).

> The law of the case doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter... The various rules which make

> up the law of the case doctrine serve not only to promote the goal of judicial economy. . . . but also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.

Commonwealth v. Starr, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995) (internal citations and quotation marks omitted).

Under the law of the case doctrine, a trial court has absolutely no power or authority whatsoever to overrule the holding of a reviewing court upon remand:

> Under the law of the case doctrine, a trial court cannot overrule the holding of this Court upon remand proceedings. *Id.* "A [trial] court is without power to modify, alter, amend, set aside or in any manner disturb or depart from the judgment of the reviewing court as to any matter decided on appeal." *Commonwealth v. Williams,* 877 A.2d 471, 2005 PA Super 217, 9 (Pa. Super. 2005). Additionally, the law of the case doctrine applies when a defendant is granted a new trial and precludes the defendant from re-litigating the admissibility of evidence when the same issue was already raised and previously decided adversely to the defendant. *Commonwealth v. McEnany,* 1999 PA Super 112, 732 A.2d 1263, 1267 (Pa.Super. 1999), *appeal granted,* 562 Pa. 667, 753 A.2d 816 (2000), *appeal dismissed as improvidently granted,* 565 Pa. 138, 771 A.2d 1260 (2001).

Commonwealth v. McCandless, 2005 PA Super 280, P8 (Pa. Super. Ct. 2005).

State of Nebraska v. White is instructive. In that case, Mr. White was convicted of second degree murder and use of a firearm, both of which were reversed on appeal, based on a jury instruction which failed to list malice as an element of second degree murder. *State v. White,* 257 Neb. 943, 944, 601 N.W.2d 731 (1999). The reviewing court reversed and remanded the case. *Id.*

The State filed a new information charging White with first degree felony murder and second degree murder. *Id.* Mr. White filed an interlocutory appeal challenging the information because he had already been acquitted of first degree murder by the first jury, and argued the State could not now charge him again with first degree murder merely by changing the theory to felony murder. 257 Neb. at 944-45. The Nebraska Supreme Court agreed, and remanded the cause for further proceedings. *Id.* at 945.

Before the new trial, the Nebraska Supreme Court held malice was not an element of second degree murder in *State v. Burlison,* 255 Neb. 190, 583 N.W.2d 31 (1998). 257 Neb. at 945. The State moved for a reinstatement of White's original convictions and sentences. *White,* 257 Neb. at 945. The trial court granted the motion. *Id.*

The Nebraska Supreme Court reversed the trial court's reinstatement of the original conviction based on the law of the case doctrine. 257 Neb. at 946. Despite the fact that the Court fully understood the concern the trial court had for the victim's mother and the potential costs of a new trial, the Nebraska Supreme Court ruled,

> The trial court failed to implement the mandate. The trial court did not have the authority to reinstate its prior judgment of convictions and sentences that the appellate court had reversed and remanded for a new trial. The only option available to a party to obtain review of a mandate is to have the appellate court which issued the mandate review the decision, and not to have the inferior court review the mandate and decide whether or not the inferior court should follow the mandate.

White, 257 Neb. at 946. The Nebraska Supreme Court was persuaded by a Michigan Court of Appeals decision, *People v. Russell,* which similarly held "a lower court is 'without power' to take action inconsistent with the judgment of the appellate court." *White,* 257 Neb. at 947, citing *People v. Russell,* 149 Mich.App. 110, 114-15, 385 N.W.2d 613 (1985). The Nebraska Supreme Court reversed the trial court's order reinstating the convictions and remanded the cause for a new trial as directed by the mandate in *White II. Id.* at 947.

Similarly, the Washington Supreme Court has ruled an appellate court's decision becomes the law of the case and issues decided on the merits by an appellate court cannot be reconsidered by a trial court. *State v. Strauss,* 119 Wn.2d 401, 412, 832 P.2d 78 (1992). Citing Rule of Procedure 12.2, the Court held the appellate court decision became "effective and binding on the parties to the review and [the decision] govern[ed] all subsequent proceedings in the action in any court." 119 Wn.2d at 412. The State in *Strauss* attempted to argue the law of the case doctrine did not preclude the trial court from reentering the same findings the Court of Appeals had invalidated. *Id.* at 413. The *Strauss* Court rejected the argument, holding, the trial court is bound by the law of the case. *Strauss,* 119 Wn.2d at 413. Accordingly, in the instant case, the trial court lacked any authority to reinstate the vacated manslaughter conviction that this Court vacated. *Strauss,* 119 Wn.2d at 413; RAP 12.2.

2. A RECALL OF THE MANDATE IS INCONSISTENT WITH THE RULES OF APPELLATE PROCEDURE AND PUBLIC POLICY

a. The Rules of Appellate Procedure specify the grounds for recall of a mandate. RAP 12.7(a) states the Court of Appeals "loses the power to change or modify its decision (1) upon

issuance of a mandate in accordance with rules 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rule 12.5(e) and rule 16.15(e)." Accordingly, concerning the mandate issued in CoA No. 43255-9-I, in order for the State to prevail on its request to recall the mandate, this Court must recall the mandate "as provided in rule 12.9." RAP 12.5(a).

RAP 12.9 Recall of Mandate provides that the Court can recall a mandate if two criteria are satisfied:

> (a) **To Require Compliance With Decision.** The Appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate; or
>
> (b) **To Correct Mistake or Remedy Fraud.** The appellate court may recall a mandate issued by it to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court.

Neither criteria are satisfied in this case.

The Court of Appeals decision in *State v. Schwab* was correct – two convictions, second degree murder and manslaughter, for one homicide violated double jeopardy and

vacation of the manslaughter conviction was required. 98 Wn.App. at 190. Following this Court's mandate under RAP 12.9(a), full compliance was rendered by the trial court with the CoA 43255-9-I on April 13, 2000, when the superior court amended the judgment and sentence and vacated the manslaughter conviction as ordered by this Court. CP 54-55. Under RAP 12.9(b), no inadvertent mistake needed correction and no decision was obtained by fraud of a party requiring modification of the decision.

b. The courts, the parties, and the public have an expectation of finality in Court of Appeals decisions requiring this Court to deny the State's motion to recall the mandate. In its Motion to Recall Mandate, the State concedes that this Court's judgment was correct when entered. App. A (Motion to Recall Mandate at 2). But the State argues, "as a result of unforeseen subsequent events, the judgment now contains an inadvertent mistake." *Id.* This argument must be rejected.

The State's argument would be analogous to appellate attorneys asking this Court to recall the mandate in cases with exceptional sentences to permit defendants to receive the benefits of *Washington v. Blakely,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), without concern for retroactivity application.

Others would also like to recall certain mandates for many child hearsay cases so that defendants would be permitted to benefit from *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *See In re Pers. Restraint of Markel,* 154 Wn.2d 262, 265, 111 P.3d 249 (2005) (holding "because *Crawford* does not apply retroactively to cases on collateral review, and because the Markels' sentencing does not raise a *Blakely* issue, their personal restraint petitions must be dismissed.")

c. The motion is untimely. Even had the State satisfied either RAP12.9(a) or (b) above, under (c), the State has not filed the motion to recall the mandate within a reasonable time, since there has been no showing a lapse of six years was reasonable. Accordingly, under the Rules of Appellate Procedure, this Court should deny the State's request to recall the mandate under cause number 43255-9-I.

The State has not identified a valid reason to recall the mandate under Court rule. In *Shumway v. Payne,* the Washington Supreme Court clarified the procedure for recalling a mandate under RAP 12.9(b):

> RAP 12.9(b) provides that an "appellate court may recall a mandate issued by it to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court." (Emphasis added.) We have been cited no authority to support an interpretation of this rule that would authorize this court to order the Court of Appeals to recall its mandate in order to provide a party the opportunity to add an issue to a petition that has already been denied. *See Reeploeg*, 81 Wn.2d at 546 (to require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice (citing *Kosten v. Fleming,* 17 Wn.2d 500, 505, 136 P.2d 449 (1943)); 3 Lewis H. Orland & Karl B. Tegland, Washington Practice: Rules Practice 348 (4th ed. 1991) (the rule should not be considered as authorizing a recall of the mandate for the purpose of reexamining the case on its merits). Additionally, RAP 12.9(c) requires a motion to recall a mandate to be made within a reasonable time.

136 Wn.2d 383, 393, 964 P.2d 349 (1998). The Court recognized in *Shumway* that the mandate was issued three years before the motion to recall mandate and no argument was made why the recall request could not be made within a reasonable time. *Id.* at 393.

Moreover, the *Shumway* Court explained under the Rules of Appellate Procedure, specifically RAP 18.8(b), a public policy preference for the finality of judicial decisions outweighs the competing policy of reaching the merits of every case, even when extraordinary circumstances are listed, since the standard set forth in the rule is rarely satisfied. *Id.* at 395. (citations omitted.) The

Shumway Court also noted that RCW 10.73.090 subjects collateral attacks on judgments or sentences in criminal cases to a one-year statute of limitation. 136 Wn.2d at 397. The Court reasoned,

> RCW 10.73.090 imposes a constitutionally valid "time limit" as a means of controlling the flow of postconviction collateral relief petitions. This court recently reiterated its observation that collateral relief "'undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. . . .'" *In re Personal Restraint of Cook,* 114 Wn.2d 802, 809, 792 P.2d 506 (1990) (quoting *In re Personal Restraint of Hews,* 99 Wn.2d 80, 86, 660 P.2d 263 (1983)); *In re Personal Restraint of Well,* 133 Wn.2d 433, 441-42, 946 P.2d 750 (1997) (holding that the 1996 personal restraint petition of an individual committed in 1980 pursuant to an insanity plea was procedurally barred because it was filed after the one- year time bar set forth in RCW 10.73.090, and because the grounds for relief did not fall within the exceptions to the limitation period).
>
> In order to file a second personal restraint petition, Ms. Shumway would have to make a threshold showing that the petition was filed within one year of the date her conviction became final, or that the grounds stated in the petition fell within one of the exceptions listed in RCW 10.73.100. She is unable to meet this threshold burden. Both RAP 16.4(d) and RCW 10.73.090 prevent the court from considering a personal restraint petition that does not meet this standard.

Shumway, 136 Wn.2d 400. Accordingly, the Supreme Court denied Ms. Shumway relief.

d. <u>The "law of the case" doctrine also bars review</u>.

Moreover, "[u]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions

which another panel has decided on a prior appeal in the same case." *Kimball v. Callahan,* 590 F.2d 768, 771 (9th Cir.), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). The *Kimball* Court quoted the following passage from *Lehrman v. Gulf Oil Corporation,* with approval:

> This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

Kimball, 590 F.2d at 771, quoting *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659, 662-63 (5 Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975), in turn quoting *White v. Murtha*, 377 F.2d 428, 431 (5 Cir. 1967).

The Washington Supreme Court has similarly ruled an appellate court should not reconsider issues already raised and resolved in a direct appeal. *In re Pers. Restraint of Gentry,* 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). The Court noted in personal restraint petitions, "in order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue." *Gentry,* 137 Wn.2d at 388, citing *In re Pers. Restraint Petition of Vandervlugt,* 120 Wn.2d

427, 432, 842 P.2d 950 (1992); *In re Pers. Restraint Petition of Taylor,* 105 Wn.2d 683, 688, 717 P.2d 755 (1986). But the *Gentry* Court noted that this "burden can be met by showing an intervening change in the law " 'or some other justification for having failed to raise a crucial point or argument in the prior application.'" *Gentry,* 137 Wn.2d at 388, citing *Taylor,* 105 Wn.2d at 688 (quoting *Sanders v. United States,* 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *see Vandervlugt,* 120 Wn.2d at 432.

Interestingly, the *Gentry* case was cited by the State somewhat recently in *In re Pers. Restraint of Percer,* 150 Wn.2d 41, 75 P.3d 488 (2003), a case that distinguished this Court's 1999 *Schwab* decision, from which the State is now seeking to recall the mandate. In *Percer,* the Supreme Court noted that for this Court to have considered Mr. Percer's PRP, the petitioner had to "show that the earlier decision was clearly erroneous, such that he was prejudiced by the decision and that the ends of justice would be served by reconsidering the matter." 150 Wn.2d at 48, citing *Gentry,* 137 Wn.2d at 388. In *Percer,* this Court determined that the earlier decision was clearly erroneous and allowed reconsideration of an issue already determined on appeal. *Id.*

But here, the State cannot make such a claim. This Court was not incorrect in 1999, when it ruled double jeopardy barred two prosecutions for the same homicide, vacated the manslaughter conviction, and affirmed the second degree murder conviction. First, there is no argument before the Court that its decision concerning double jeopardy was incorrect, as indeed no error was made in ruling two convictions for one homicide violated double jeopardy. But importantly, at the time of the appeal in 1999, this Court's remedy of vacating the manslaughter conviction and affirming the murder in the second degree conviction was not error. Such was the law of the land at the time of this Court's ruling. Accordingly, the State cannot in any way claim that this Court's 1999 decision was in error and therefore recall of the mandate would be improper.

In *Percer,* the Washington Supreme Court determined that vehicular homicide and second degree felony murder were not the same offense. 150 Wn.2d at 50. In making that determination, the Washington Supreme Court actually reviewed this Court's *Schwab* decision and distinguished that case from the offenses at issue in Mr. Percer's appeal. 150 Wn.2d at 51. Unlike the offenses which this Court correctly found violative of double jeopardy principles in

Schwab, the *Percer* Court determined convictions for both vehicular homicide and second degree felony murder did not violate double jeopardy. 150 Wn.2d at 54.

This Court should reject the State's request to recall the mandate. This Court made no error in its 1999 ruling in *State v. Schwab.* The decisions in *Andress* and *Hinton* which ruled petitioners, such as Mr. Schwab, who were convicted of second degree felony murder predicated on assault must be vacated were not before this Court in 1999. This Court properly issued its decision which became final upon the issuance of the mandate under RAP 12.7, and no valid reason to recall the mandate has been offered under RAP 12.9. Moreover, the law of the case doctrine and the time bars of collateral relief under RCW 10.73.090 prevent the State from relitigating issues fully decided on their merits in 1999 by this Court.

e. <u>If this Court recalls the mandate, the remedy would be to reopen all issues raised in the initial appeal, not simply set aside a portion of the opinion as the State requests</u>.

Recognizing the fact that this Court did not rule on the instructional error in the first appeal, the State impliedly requests this Court not to revisit those unsettled issues, but rather merely asks this Court

to "set aside the portion of the opinion that vacates the defendant's conviction for first degree manslaughter." App. A (Motion to Recall Mandate at 1). Such a remedy is contrary to all notions of fairness and justice and is not the proper remedy.

Instead, should this Court recall the mandate as the State requests, it would open all claims previously litigated and decided by this Court, including Mr. Schwab's 1999 argument the trial court's failure to instruct the jury on premeditated murder's lesser offense of second degree manslaughter was reversible error. In this Court's 1999 decision, this Court did not address the instructional challenge because the manslaughter conviction that stemmed from the premeditated murder charge was vacated and the second degree felony murder conviction which was affirmed had no such lesser included offense:

> F. We Need Not Address Schwab's Instructional Challenge
>
> We need not address Schwab's challenge to the trial court's refusal to instruct on second degree manslaughter because the jury convicted Schwab of second degree felony murder, the conviction for which stands, and we have no doubt that an instruction on second degree manslaughter would have had no impact on the conviction here for felony murder. And there is no longer any reason to give the jury a choice between first and second degree manslaughter because under an extension of our holding, Schwab may not be convicted of both second degree felony murder and second degree manslaughter.

Schwab, 98 Wn.App. at 189-90. If this Court were to recall the mandate, Mr. Schwab would be entitled to relitigate the instructional error and a new trial with instructions to include a second degree manslaughter lesser included instruction would be required.

Rather than reopen this case and relitigate issues decided by this Court six years ago, this Court should deny the State's request to recall the mandate as inappropriate under RAP 12.9 and contrary to the dictates of the "law of the case" doctrine, which calls for finality and efficiency of the judicial process by protecting against relitigation of settled issues. *Shumway,* 136 Wn.2d at 393; *Reeploeg*, 81 Wn.2d at 546.

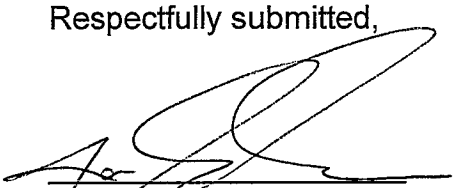
F. CONCLUSION.

The trial court lacked authority to reinstate a conviction in 2005 that this Court held must be vacated in 1999 and which the trial court amended the judgment and sentence in 2000 in compliance with this Court opinion. Mr. Schwab requests this Court to reverse the trial court's 2005 order reinstating his 1999 conviction with instructions to vacate his convictions and dismiss his case with prejudice. Mr. Schwab also asks this Court to deny

the State's request to recall the mandate for the 1999 decision as the State has failed to identify any authority in which this Court could grant his request.

DATED this 30th day of September, 2005.

Respectfully submitted,



JASON B. SAUNDERS (24963)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. DALE E. SCHWAB, Jr., Appellant.	No. 43255-9-I MOTION TO RECALL MANDATE

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

Recalling the mandate issued in this case. The court should set aside the portion of the opinion that vacates the defendant's conviction for first degree manslaughter.

III. RELATED CASES

This motion is based on the same proceedings as the Motion to Recall Mandate in cause no. 53035-6-I.

IV. FACTS RELEVANT TO MOTION

In 1998, the appellant, Dale E. Schwab, Jr., was found guilty by a jury of second degree felony murder and first degree manslaughter. On appeal, this court affirmed the murder conviction. The court found, however, that the convictions for both murder and manslaughter constituted double jeopardy. It therefore vacated the manslaughter conviction. State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999). The mandate was issued March 13, 2000.

In 2003, the defendant filed a personal restraint petition challenging his felony murder conviction, based on In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The court stayed action on this petition pending In re Hinton, 152 Wn.2d 854, 100 P.3d 801 (2004). The court then issued an order vacating the murder conviction. The case was remanded to the Superior Court "for further lawful proceedings consistent with Andress and Hinton." The Certificate of Finality was issued on February 25, 2005.

On remand, the State sought reinstatement of the manslaughter conviction. The defendant argued that the court was still bound by this court's decision overturning that conviction. In an oral ruling, the judge rejected this argument and ordered reinstatement of the conviction. Sentencing is set for April 29. The defendant has stated that he intends to appeal the manslaughter conviction.

V. GROUNDS FOR RELIEF AND ARGUMENT

Under RAP 12.9(B), a mandate may be recalled to correct an "inadvertent mistake." In the present case, the court's judgment was correct when entered. Nevertheless, as a result of unforeseen subsequent events, the judgment now contains an inadvertent mistake.

This court set aside the defendant's manslaughter conviction because it duplicated his murder conviction. At the time, this reasoning was correct. Subsequently, however, the court set aside the murder conviction. As a result, the reason for setting aside the manslaughter conviction no longer exists. See State v. Ward, ___ Wn. App. ___, 104 P.3d 61 (2005).

Notwithstanding these events, the defense is still arguing that the trial court is bound by this court's decision on the direct appeal. This court should now make it clear that the decision on appeal is no longer effective.

Under RAP 12.9(c), a motion to recall a mandate should be made within a reasonable time. The basis for this motion did not arise until February 25, 2005, when this court issued its Certificate of Finality vacating the murder conviction. The delay between February 25 and the present date is a reasonable time for bringing this motion.

Respectfully submitted on April 20, 2005.

Seth A. Fine

SETH A. FINE # 10937
Deputy Prosecuting Attorney

Attorney for Respondent

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.
I certify under penalty of perjury under the laws of the State of Washington that this is true.
Signed at the Snohomish County Prosecutor's Office this 20 day of April, 2005

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,

Plaintiff,

vs.

DALE LESLIE SCHWAB,

Defendant.

NO. 98-1-00242-0

TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

FEBRUARY 17, 2005
and
FEBRUARY 24, 2005

HONORABLE KENNETH L. COWSERT
Judge

Department No. 201
Snohomish County Courthouse
Everett, Washington

Reported by:
Laurel Olson
Official Court Reporter
CR #29906-2645
425) 388-3088

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, Plaintiff, vs. DALE LESLIE SCHWAB, Defendant.	)	NO. 98-1-00242-0

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 17th day of February, 2005, the above-entitled and numbered cause came on for hearing before the Honorable KENNETH L. COWSERT, one of the judges of the above-entitled court, sitting in Department No. 201 thereof, at the Snohomish County Courthouse, in the City of Everett, County of Snohomish, State of Washington.

The Plaintiff was represented by CRAIG MATHESON, Deputy Prosecuting Attorney for Snohomish County;

The Defendant was present and represented by his attorney, STEPHEN GARVEY.

WHEREUPON, both sides having announced they were ready to begin, the following proceedings were had, to wit:

2:00 p.m., THURSDAY
FEBRUARY 17, 2005
SNOHOMISH COUNTY SUPERIOR COURT

* * * * * * * * * *

MR. HILTNER: State v. Schwab, Number 12 on the calendar, Cause Number 98-1-00242-0.

MR. MATHESON: Good afternoon, your Honor; Craig Matheson for the State. Steve Garvey is here for Mr. Schwab. Mr. Schwab is present, in custody.

Your Honor, this is a return from the State Supreme Court on an Andress decision. The State's position is that a jury convicted Mr. Schwab of both Manslaughter One and Felony Murder Two, which the State Supreme Court has indicated was an incorrect crime. It's our position that the Court ought to set this in front of itself for sentencing on the Manslaughter One.

We have a somewhat tortured appellate record on this matter, and I believe Mr. Garvey has several things to say about that; but it might be best to set this in front of your Honor so we can fully brief and argue the particular merits of the various positions.

THE COURT: You are choosing me because it was Judge Trumbull who --

MR. MATHESON: Judge Trumbull was the trial judge.

THE COURT: Is that okay with you, Mr. Garvey?

MR. GARVEY: That you keep it?

THE COURT: Yes.

MR. GARVEY: That's fine. I think we all recognize, no matter what happens, it's going to go back to the Court of Appeals, for any number of reasons.

My position on this is that, based on the Court of Appeals ruling, which was signed January 6th of this year, Mr. Schwab's Personal Restraint Petition was granted; we remand this matter to the Snohomish County Superior Court for further lawful proceedings consistent with Andress and Hinton.

My position is the Court can no longer hold Mr. Schwab for any reason because Andress has wiped out his Murder Two conviction. That leaves the conviction for Manslaughter One, except for the problem in the Court of Appeals at 98 Wn.App. 179, on page 190, which says, We affirm Schwab's conviction and sentence for Second Degree Felony Murder and vacate his conviction and sentence for First Degree Manslaughter.

Therefore, since it has been vacated by the Court of Appeals, this court has no authority to hold Mr. Schwab on either the Second Degree Murder because of Andress and Hinton or on the Manslaughter One because of the Court's decision in State v. Schwab.

THE COURT: Vacating --

MR. GARVEY: Vacating the Manslaughter One conviction.

I think Mr. Matheson's position is that the Court of Appeals should unvacate that. And that may be so; but, right now, what you've got here is Mr. Schwab, who has been convicted at this point of nothing, nor can the State recharge him with anything because of mandatory joinder problems. So I think we are just completely sort of sitting here with somebody that needs to be released from custody because I think "vacate" means it's gone, and Andress and Hinton say the Murder is gone, and there are no grounds to hold him.

THE COURT: Mr. Matheson.

MR. MATHESON: It's not surprising that I disagree with Mr. Garvey. The Manslaughter One was vacated on double jeopardy grounds because both the Manslaughter and the Murder Two talk about the same homicide. Since the State Supreme Court in its wisdom has indicated that Felony Murder Two was a nonexistent crime, then there's no reason to --

THE COURT: Then there's no double jeopardy.

MR. MATHESON: There's no double jeopardy.

MR. GARVEY: Except it's been vacated. And that may be, in fact, what the Court of Appeals said; Well,

we're going to unvacate it. But at this point, it's been vacated. And I love telling judges this, because I love to see their reaction: You can't do what Mr. Matheson wants you to do.

THE COURT: How do we deal with that? If it's been vacated, that seems to me to be pretty much the statement, it's been vacated, even though the reason it was vacated no longer exists.

MR. MATHESON: Well, what I think we need to do is to set this in front of the Court where we can actually brief this in a little bit more detail as opposed to giving the Court a running commentary on about 30 seconds' notice.

MR. GARVEY: I have no problem with that; but I think, in the meantime, you have to release Mr. Schwab.

THE COURT: What's your position on that?

MR. MATHESON: I respectfully disagree with that assessment.

MR. GARVEY: What's he being held on, then?

MR. MATHESON: The State's position is that the jury convicted him on Manslaughter in the First Degree.

THE COURT: The Court of Appeals vacated that conviction.

MR. MATHESON: On double jeopardy grounds.

THE COURT: They vacated that conviction, period; right?

MR. MATHESON: They vacated it on double jeopardy grounds on a crime that doesn't exist and, apparently, according to the State Supreme Court, didn't exist at the time.

MR. GARVEY: But they didn't say, in their opinion, Unless the Supreme Court changes the law on Murder Two based on an Assault Two, in which case we will unvacate it. I mean, vacate means vacate.

THE COURT: Well, it does, does it not?

MR. MATHESON: I'm sorry?

THE COURT: Does it not mean vacate?

MR. MATHESON: I don't think it means what Mr. Garvey says it means.

THE COURT: Counsel, just tell me what it means, then. I always thought if the Court said a conviction is vacated, maybe their reason was totally, entirely wrong, but how do we get around it being vacated? Give me some authority.

MR. MATHESON: That's why I'm asking the Court to set this over, so we can do that.

MR. GARVEY: Again, I have no problem with setting it over for hearing; but I still don't think the Court can hold Mr. Schwab in the meantime.

THE COURT: Where would Mr. Schwab be going if I were to release him?

MR. GARVEY: His mother is here in court; I assume he'd be going to stay with her.

THE COURT: We are going to -- is the 24th okay, next Thursday?

MR. MATHESON: If that's when the Court plans on setting this, someone will be there.

THE COURT: 1:00, Department 5. Until then, I will maintain Mr. Schwab in custody. We will deal with what happens on Thursday.

MR. MATHESON: I'll hand forward an order to that effect.

MR. GARVEY: Can I inquire of the Court what he's being held on?

THE COURT: A Manslaughter charge. I appreciate you telling me that that conviction has been vacated. But I think, quite frankly, given the nature of the offense, it is conceivable that that vacation is in error. If it was dismissed on double jeopardy grounds and, in fact, at that time, as we now know, the crime didn't exist, there was no double jeopardy.

I'm going to at least give everyone an opportunity to adequately brief that.

MR. GARVEY: There was double jeopardy at the time. Now, they may undouble-jeopardy Mr. Schwab --

THE COURT: I guess that's what I'm saying, is

they undid it because they have eliminated Felony Murder as a crime that could have justified any sort of finding of double jeopardy.

MR. GARVEY: So you are overturning the Court of Appeals decision.

THE COURT: In a way, I guess; but I don't think I'm overturning it. But that's going to be my ruling until Thursday.

MR. GARVEY: Okay.

MR. MATHESON: Your Honor, the Court is going to maintain bail as it was set initially?

THE COURT: Correct.

MR. GARVEY: Which was $50,000.

THE COURT: It seems to me, Mr. Garvey, at the very least, there's a finding that there's probable cause to believe he committed manslaughter.

MR. GARVEY: That's true; but because of double jeopardy, the State cannot refile that.

THE COURT: Well, I guess we'll address that on Thursday, too, because that may not be the result.

In any event, that's where we are; next Thursday, 1:00.

(Proceedings adjourned.)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
V.	)	COA NO. 56206-1-I
	)	(COSOL. W/ NO. 43255-9-I)
DALE SCHWAB,	)	
	)	
APPELLANT.	)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 30TH DAY OF SEPTEMBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 ROCKEFELLER AVENUE, M/S# 504
EVERETT, WA 98201-4046

[X] DALE SCHWAB
DOC# 745484
SCCC
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2005.

X _____